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IN THE

Supreme Court of the United States

October Term, 1978

NATIONAL CAUCUS OF LABOR COMMITTEES, U.S. LABOR PARTY, LYNDON H. LAROUCHE, JR., JENNY LEONARDO, NANCY SPANNAUS, ALAN YUE, KEN MANDEL, CAMPAIGNER PUBLICATIONS, INC., TONY CHAITKIN, THE NATIONAL UNEMPLOYED AND WELFARE RIGHTS ORGANIZATION AND THE INTERNATIONAL PRESS SERVICE,

Petitioners,

against

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW),

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITION FOR WRIT OF CERTIORI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Defendants-Appellants below, Petitioners herein, pray that a Writ of Certiori issue to review the judgment of the Second Circuit Court of Appeals entered in the above-entitled case on May 15, 1979.

Dated: New York, New York
June 10, 1979

David S. Heller
304 West 58th Street
New York, N. Y.
10019
[212] 247-7488

OPINIONS BELOW

This is an appeal from an Order by the United States Court of Appeals for the Second Circuit dated March 15, 1979, affirming without opinion an Order of the Southern District of New York, a copy of which is annexed hereto.

JURISDICTION

The opinion of the Court below, which constitutes its judgment, was entered on May 15, 1979. The jurisdiction of this Court is invoked pursuant 28 USC 1254 [1].

STATUTES INVOLVED

This case involves the proper construction of Canon 9 of the

Code of Professional Responsibility, D.R. 9-101[B], and indirectly, Canon 4 and D.R. 7-105.

ISSUES RAISED ON APPEAL

The issues raised on the appeal were whether two attorneys and their present firm may represent plaintiff and its original attorneys in the circumstances that these two attorneys held high level jobs in the Department of Justice [hereinafter DOJ] at a time when the DOJ was investigating defendants, and 1] the said investigation included inquiry into the very issues presently under litigation, 2] the said investigation included inquiry into the very suit for which the said attorneys are now privately retained, 3] the said investigation included the gathering of confidential information about defendants gathered in illegal fashion, 4] the attorneys in question were personally responsible for, and did in fact decide to, continue the said investigation, and 5] the DOJ inquiry included illegal gaining of access to the office of Petitioners' attorney and theft of his work product files by a DOJ informant who is a proposed witness in the matter at bar, and the matter at bar concerns the attempt by an attorney to influence the very DOJ investigation that the two former DOJ attorneys were in charge of.

NATURE OF ACTION AND RESULT BELOW

Defendants moved to disqualify plaintiff's attorneys for ethical violations involving the UAW's attorney, one Stephen Schlossberg, attempting to suborn the DOJ to prosecute defendants, and using an FBI informant to steal legal files from defendants' attorney's office. The District Court, Lawrence W. Pierce, Judge, referred the matter to a magistrate, Honorable Kent Sinclair. Magistrate Sinclair recommended disqualification, and the plaintiff appealed the matter to Judge Pierce, who agreed at plaintiff's request to hold a hearing on this matter,

although he had previously cancelled a scheduled hearing, also on plaintiff's request. Plaintiff retained as special counsel, for the purpose of the disqualification matter, a firm including two attorneys who, while in governmental service the year before, had been in charge of the investigation of defendants, and were familiar with, and even involved in, the acts underlying the disqualification of plaintiff's original attorneys. Defendants moved to disqualify these attorneys as well. Judge Pierce denied this Motion. Defendants appealed, and the Second Circuit affirmed without opinion.

FACTS

History. This appeal comes before this Court as part of a long and involved course of litigation. The plaintiff is the United Automobile Workers of America, [hereinafter UAW]. The Defendants-Petitioners [hereinafter Defendants] are members of the National Caucus of Labor Committees, the U.S. Labor Party, the company which prints the newspaper of those organizations, and several individuals. Although several of the defendants have no connection with the NCLC, the defendants will be hereinafter referred to collectively as the NCLC for the sake of convenience. The UAW is a national labor union. Since about 1970, the UAW and the NCLC have been engaged in a political dispute centered around economic policy. The UAW favors the creation of low-skill, low-wage jobs, while the NCLC favors technology-intensive development, exemplified by nuclear power, coupled with educational and social programs, such as strict enforcement of the anti-drug laws, to upgrade the work-force to use such technology.

In 1974, the UAW decided to resolve its dispute with the NCLC by utilizing its large financial resources and influence with the government to destroy the NCLC. One part of that campaign, as revealed in DOJ documents obtained by NCLC, was the underlying suit herein, which alleges that the defendants have infringed upon UAW's alleged proprietary rights in the word "Solidarity", which UAW uses as part of the title of

its membership magazine "UAW Solidarity", by publishing "New Solidarity" as the newspaper of the NCLC.

At first impression, it would seem that this is a classic example of the sort of dispute that ought to be settled in the arena of public debate rather than the courts. This, indeed, has been NCLC's contention. However, the District Court has repeatedly rejected this contention.

In general, the UAW's campaign consisted of three tactics. The first was what the UAW characterized, in a confidential report submitted by UAW to the DOJ, and obtained under the Freedom of Information Act [FOIA] by defendants, as "Overwhelming physical force." The second was the institution of specious lawsuits, and the third was the incitement of governmental agencies against the NCLC.

The first tactic resulted in the criminal conviction of several UAW officials. See *People v Sedluck*, Case No. CR523 [Perrysburg Ohio, 1974]and *People v Pratt*, Case No. CR540 [Perrysburg Ohio, 1974]. Additionally, the UAW wound up paying civil damages to NCLC members injured in the UAW's campaign of wanton assaults. See *U.S. Labor Party v Sedluck and Local 1435 UAW*, Civil Action No. C74-411 [N.D.Ohio, 1974].

The second tactic involved several suits, attempting to enjoin the NCLC from publishing its newspaper, all of which have concluded save the case at bar. See eg. *UAW v New Solidarity*, No. S75-341 [Marion County Superior Court, Indiana] dismissed April 11, 1975.

The third tactic is illustrated by the facts underlying the instant Petition.

The Underlying Case. As part of the second tactic, the UAW sued the NCLC for the alleged trademark infringment described supra. The UAW, however, was not content to prosecute this suit in the normal manner in which litigants prosecute such matters, and attempted to "stack the deck" as it were. The UAW's heavy-handed attempts to ensure a guaranteed outcome of the instant case led to the disqualification of the UAW's counsel.

The First Disqualification. a] *The Schlossberg Papers*. One Stephen Schlossberg was the UAW's attorney in the underlying case, along with local counsel, Cowan, Liebowitz & Latman. [Hereinafter, the Cowan firm]. In the course of separate litigation

under the Freedom of Information Act [FOIA], the NCLC found that attorney Schlossberg was attempting to bolster his "trademark" case by lobbying various agencies of the Federal government to prosecute the NCLC for offenses which the candid Schlossberg admitted in writing that he knew the NCLC had not committed. For instance, Schlossberg approached the Department of Labor [DOL] and demanded prosecution of the NCLC, which is not a union, under the Landrum-Griffin Act. When the DOL pointed out that there was no legal basis for such prosecution, Schlossberg wrote to the Secretary of Labor, berating him for getting "hung up on legal technicalities," and demanding that the NCLC be prosecuted.

Finding no success at the DOL, Schlossberg approached the DOJ and the Attorney General with similar demands, which he repeated yet later to the Federal Election Commission. In each instance, Schlossberg was explicit in pointing out that such prosecution, coupled with the underlying case, would bankrupt the NCLC, which was the UAW's aim. This was but one prong of Schlossberg's attack, however.

b] *Gregory Rose*. One Gregory Rose was an FBI informant in the NCLC. Until September, 1977 the NCLC, in part at Schlossberg's behest, had been under investigation by the FBI. In 1977 the investigation terminated. No NCLC member had ever been indicted as a result thereof, nor was there so much as a grand jury presentment. However, during the period of investigation, informant Rose was infiltrated into the NCLC. Rose, posing as an NCLC member, offered to do volunteer paralegal work on the UAW-NCCC case—*the very case at bar*. While doing such work, Rose stole part of the undersigned attorney's files and conveyed the same to Schlossberg.

Schlossberg, in turn, announced that, although the alleged trademark infringement occurred in 1970, and Rose had not even infiltrated the NCLC until 1973, Rose was to be the UAW's star witness at trial.

These facts were presented to the District Court in a Motion to Disqualify pursuant to the Code of Professional Responsibility, D.R. 7-105 and 9-101 as well as Canon 4. The said Motion was referred to Magistrate Sinclair, and granted. Schlossberg is now the subject of disciplinary hearings before the Board on Professional Responsibility of the District of Columbia Court of Appeals.

c] *The Second Disqualification.* The UAW, having had Mr. Schlossberg and the Cowan firm disqualified, retained the services of Patterson, Belknap, Webb, and Tyler [the Patterson firm]. That firm included Rudolf Guiliani and Harold Tyler among its members. Mr Tyler is, in addition to being a former District Judge in the Southern District of New York, the former Deputy Attorney General [DAG] during the period of Schlossberg's influence-peddling campaign at the DOJ. Mr. Guiliani was Tyler's chief assistant. The Patterson firm was hired on the advice of Joe Rauh, who is Schlossberg's attorney in the disciplinary hearings in Washington.

Harold Tyler, as DAG, was the man in charge of the DOJ investigation of the NCLC. Mr. Tyler was, in fact, the man who decided in 1976 *not* to end the investigation of the NCLC which, therefore, continued for another year before Tyler's successor ordered it ended as having no basis in fact. This was the same investigation that Schlossberg attempted to enflame. Following Tyler's review, this same investigation was highlighted as the DOJ's most important "domestic security" investigation.

It is highly significant that the DOJ file on the NCLC, the file that Tyler was responsible for reviewing and passing on contained numerous references to, and documents from, *the very case at bar.* In fact, in the case of *LaRouche v Kelley*, 75 Civ 6010 (MJL) [SDNY], an on-going case involving the investigative activity pursuant to which the FBI files were collected, the government has agreed to a Consent Order that the said files not be revealed to any third party, the provisions of the FOIA notwithstanding. The government thus concurs in the defendants' characterization of these files as highly confidential. But the result of the decision below would be that an attorney who had access to these confidential files, while incumbent as DAG of the United States, would be allowed to oppose the defendants in a civil case.

It was against this factual background that the NCLC moved to disqualify the Patterson firm. This Motion was denied. The Court below heard oral argument, but declined to hold an evidentiary hearing in this matter. Defendants' Appeal followed, and the Second Circuit affirmed without opinion.

SUMMARY OF ARGUMENT

THE DECISION OF THE COURTS BELOW PERMITTING TWO HIGH-RANKING FEDERAL OFFICIALS AND THEIR LAW FIRM TO PARTICIPATE IN A MATTER OVER WHICH THEY HAD DIRECT RESPONSIBILITY BEFORE THEY LEFT GOVERNMENTAL SERVICE, ONE YEAR BEFORE, CONFLICTS WITH ALL PRIOR DECISIONS IN THE COURTS OF APPEALS AND UNDERMINES THE INTEGRITY OF THE BAR

ARGUMENT

The District Court issued an 18 page decision in this matter. That opinion misapprehended the nature of the case before the Court. Judge Pierce relied exclusively on case law applicable to *low* ranking former public officials, while the case at bar involves *the second ranking officer in the United States DOJ and his top assistant.* In so doing, that Court ignored the applicable law as it has been authoritatively stated by the Second Circuit, by other Circuits, and, in other circumstances, by Judge Tyler himself. In affirming without opinion, the Second Circuit placed itself in contradiction, on this vital question of law, with other Circuits, particularly the Seventh and Eighth Circuits, which had relied upon the Second Circuit's previous position.

The issue before this Court is the construction of Canon 9 and D.R. 9-101 (B) of the Code of Professional Responsibility. These rules read as follows:

> "Canon 9: A lawyer should avoid even the appearance of professional impropriety.
>
> D.R.9-101(B):
>
> A lawyer should not accept private employment in a matter in which he had substantial responsibility while he was a public employee."

Judge Tyler himself has stated that a niggardly, hypertechnical reading of this rule would defeat the plain intent of Canon 9, which is to dispel even the appearance of impropriety from the Federal Courts.

> "The power of this Court to disqualify lawyers is based on the Court's general supervisory powers, and questionable behavior will not be permitted merely because it is not directly covered by the canons." *Handleman v Weiss* 368 F Supp. 258, 263 (SDNY 1973) Tyler, J.

The question at bar is whether a firm composed in large part of former high ranking government officials can, exactly one year and five days out of office, participate in a civil action against defendants whom they investigated, whose confidential files they reviewed, and with regard to an aspect of the matter of which they have special knowledge. A state of affairs more calculated to instill a cynical attitude in the public with regard to the legal profession can hardly be imagined. Were the Patterson firm to be allowed to represent Schlossberg and the Cowan firm in the hearing that Judge Pierce has stated that he will hold in this matter, an already cynical public would be presented with the following incredible spectacle.

Gregory Rose, a DOJ informant who infiltrated and stole files from the NCLC's attorneys in the case at bar would be on the stand before Judge Pierce. The subject with regard to which Rose would be examined would be Rose's activities with regard to the DOJ and to Schlossberg. Rose would appear on behalf of Schlossberg, an attorney now disqualified herein, and facing disciplinary charges because of his activities, *inter alia* in attempting to suborn the DOJ. Who would represent Schlossberg and examine Rose on his behalf? A firm of attorneys whose members include the two highest ranking public officials in charge of reviewing and directing the ivestigation of NCLC that Schlossberg tried to enflame, and with regard to which Rose was employed *in the very activities which are the subject of the underlying Motion.* A public that now holds a cynical and jaundiced view of the legal profession, considering it populated by venal men and characterized by the "fix" would find nothing whatsoever in that result to modify such an opinion.

The Circuit Courts of Appeals have uniformly rejected any rule of law that would have such an untoward result. One of the leading figures crusading against this undermining of the public's faith in the justice system has been Chief Judge Kaufman of the Second Circuit. The earliest, and still, after over twenty years, the only comprehensive discussion of the problem at bar is Judge Kaufman's article "*The Former Government Attorney and the Canons of Professional Ethics*" 70 Harvard Law Review 657 (1957), recognized as unique in *Allied Reality v Exchange Bank* 283 F. Supp. 464, 468 *aff'd* 408 F.2d 1099 (8 Cir.) *cert. den.* 396 US 823 (1969).

In that article, Judge Kaufman set forth the prime consideration of law that the Court below failed to apply; the distinction between *high ranking* and *low ranking* former government officials. Judge Kaufman sets forth the standard of responsibility of *high* ranking government officials for any and all work done in their baliwick. This is the standard which the Court below erred in failing to apply.

> "Although there are many supervisory officials who are ultimately responsible for myriad decisions which they do not personally make and for numerous rulings which they never actually review, nonetheless, since ultimate responsibility is theirs, knowledge of all work done by their subordinates should be imputed to them. This position is similar to the conclusion that *the specific requirement to perform a related task will disqualify regardless of whether that assignment was actually performed. I believe this rule of vertical responsibility is absolutely essential to avoid the appearance of evil.*" 70 Harvard Law Review at 666 (*emphasis added*)."

> "It was necessary, in order to avoid the appearance of evil, *that a supervisory official be presumed to have knowledge of the contents of all documents which came to his office.*" *id* at 667 (*emphasis added*).

The Courts below, in ignoring this presumption, or ruling that it disappeared conclusively and as a matter of law in the face of a pro forma denial of impropriety, which was neither

subject to examination, nor examined in the context of the evidence before the Court, committed error. Judge Kaufman, in creating a strong presumption that a high-ranking official is responsible for the contents of all matters he passes on, except in the most extraordinary of circumstances (of which the customary delegation of weighty matters alleged herein is not one), was on firm ground. As early as ABA Formal Opinion 37 (May 4, 1931) the rule has been that where an attorney,

> "Though he has no recollection of the matter, the records show that the report. . .was made *or approved by* (the official). . .*whether he made an examination of the matter personally, or whether he merely approved the work of one of the other examiners. . .*"

The official, *ten years afterward*, in proceedings "*of an entirely different nature*" was disqualified.

Albeit morals may be more lax than in the 1930's, where, as in the case at bar, the official was involved in the *same* matter just *one* year before, the official should be disqualified. The conclusion is all the more compelling in the instant case, since Tyler's chief subordinate, Guiliani, is also with the Patterson firm. The attorney involved in Opinion 37 withdrew upon being informed of the facts. It is regrettable that the Patterson firm did not do the same. A survey of the decisional law shows that Judge Kaufman's standards, far from being outmoded, were applied without exception until the decision at bar, and require the Patterson firm's disqualification.

In *Allied Reality v Exchange Bank, SUPRA*, the Eighth Circuit explicitly adopted Judge Kaufman's views, as previously noted. *Allied* concerned a former Federal prosecutor who, as a trial attorney, had reviewed FBI files of certain defendants (Acquitted at trial) whom he later was retained to oppose in a civil action. The civil action had been filed before the criminal case, unlike the case at bar, and was plainly not based upon government information. The former government official argued the same position that he had taken for the government. This was, then a case in all respects analogous to the one at bar. Nonetheless, because Abramson, the former prosecutor

> "Became aware of, or had access to, various FBI and postal inspectors' written and oral reports. . ." 283 F. Supp. at 466

he was, for that reason alone, disqualified. The reason was that the Court knew its duty to be to prevent *even the appearance* that a government official might

> "Take a certain stand in the hope of later being privately employed to uphold or upset what he had done." Drinker, *Legal Ethics* 130.

The Court held in categorical terms:

> "*There is absolutely no evidence that Abramson in the instant matter intended to so aid his practice in working as Special Assistant*, but 'the appearance of evil' so detrimental to the profession appears to be present. Again, the wisdom of Canon 36 and the Hilo decision (Hilo v Learner, 258 F. Supp. 23 (1966) is shown." 283 F. Supp. at 469 (*emphasis added*).

Significantly, both the *Hilo* and *Allied Realty* cases, like the case at bar, concerned access to FBI investigative files and reports.

Since the *Allied* decision, the law has become more stringent rather than more relaxed. DR 9-101 (B) the successor to Canon 36, states:

> "the definite injunction contained in D.R. 9-101 (B) to avoid even the appearance of impropriety, is new." Wise, *Legal Ethics*, p. 125.

Accordingly, the recent cases take an uncompromising ethical stand. The old canons

> "Admonished the members of the bar that their conduct should be such as to merit the approval of all good men. *That conduct should not be weighed with hair-splitting nicety.* We have found no exceptions to the exhortation to 'abstain

from all appearance of evil' Thessalonians 5:22." *Allied Realty v Exchange Bank*, 408, F.2d 1099, 1101-1102 (*emphasis added*).

That admonishment has now become a requirement. The specific issue of ex-government officials is a part of that stern rule. The leading case, fittingly, was written by Judge Kaufman.

In *General Motors v New York City*, 501 F.2d 696 (2 Cir., 1974), a District Court's refusal to disqualify plaintiff's attorney, decided under DR 9-101 (B), was reversed. The attorney, Reycraft, had formerly worked for the Department of Justice in anti-trust work involving G.M., and now was involved in a previous anti-trust suit againt G.M. Judge Kaufman, citing *Allied Realty*, rejected the hypertechnical approach to ethics (501 F.2d at 560) and based himself on *Emle v Pantentex*, 478 F.2d 562 (2 Cir., 1973) stating that:

> "The subtleties of differential proof, will not obviate the 'appearance of impropriety.'" 501 F.2d at 651.

The Second Circuit, in holding that Reycraft had to be disqualified adopted the Eighth Circuit's rule, itself founded on Judge Kaufman's principles. The Court below, in overruling these precedents *sub silento*, threw this area of law into confusion which this Court must now remedy.

The District Court relied chiefly upon two cases, *Allbrand v Advent*, 78 Civ 2510 (SDNY, Dec. 4, 1978) and *Lasky Brothers v Warner Brothers*, 224 F.2d 824, *cert. den.*, 350 U.S. 932 (1956). Examination of these cases reveals clearly how inapplicable they are to the facts at bar.

The facts in the *Allbrand* case, when compared to the agreed-upon facts of record in the case at bar, virtually compel the conclusion that Judge Tyler and his firm ought to be disqualified. This is because of two categories of fact.

1. The *Nature* of the Inquiry. In *Allbrand*, to put the matter in plain terms, nothing happened between the government and Advent, the party seeking disqualification. As Judge Gagliardi put it:

> "The FTC investigation in this case never extended beyond an exchange of correspondence and a one-day review of

> Advent's books and records. . .(as opposed to *General Motors v City of New York*, 501 F.2d 639, (2 Cir., 1974) where the court of Appeals was undoubtedly influenced by the extensive nature of the prior government inquiry." *Slip Op.*, page 8.

In the case at bar, the prior government inquiry lasted seven or more years, produced 42 *volumes* of documentary reports, and occupied the time of hundreds of agents. See generally the proceedings in *LaRouche v Kelley*, 75 Civ 6010 (MJL) SDNY, a proceeding still pending wherein the FBI has partially released the said documents, but is withholding still hundreds of additional documents. For at least two years of this time Judge Tyler headed the investigatory agency and had access to the full files which, as noted, the DOJ has agreed ought not be available, even under the FOIA. Thus, the controlling case was not *Advent* but *GM v City of New York*, 501 F.2d 639 (2 Cir., 1974).

The government decided, in fact, *not* to investigate *Advent*.

> "The FTC took no formal action against Advent. Moreover, no recommendation. . .was proposed by the staff to Givens nor was Advent mentioned to him. . ." *Slip. Op.*, page 3.

Attorney Givens, it appears at page 10 of the *Advent* Slip Opinion, "did not make any decision whatsoever in regard to anything related to Advent." In fact, "Advent was not even mentioned to him."

Judge Tyler, while DAG, *did* have defendants mentioned to him, and he *did* make a decision. Judge Tyler was *the* DOJ official responsible for reviewing and affirming the recommendation to continue the NCLC investigation in August, 1976, as part of the the DOJ's implementation of the "Levi Guidelines."

2. The *Timing* of the Inquiry. The investigation which Judge Tyler was responsbile for continuing ran from 1969 to 1977. The suit he now seeks to involve himself in was commenced in 1974.

The *Allbrand* case was filed in 1978. The FTC's one-day investigation occurred in 1975. Judge Gagliardi states with perfect clarity:

"Plaintiff did not become a dealer in Advent products until April, 1977, and plaintiff is not complaining of any actions taken by Advent prior to that date. . .Whatever Advent's policies were in 1975 at the time of the FTC's investigation, plaintiff's cause of action relates only to policies adopted by Advent in 1977 and implemented in both 1977 and 1978." *Slip Op.*, page 6

The activities of Mr. Schlossberg and the Cowan firm, which are Judge Tyler's concern, occurred right in the very *heart* of the period of investigation, and during the very period of time when that investigation was under the direction of Harold R. Tyler, Jr.

As the *Allbrand* opinion says, quoting Judge Kaufman:

"When an attorney was the head of a government office or subdivision . . . the inference arises that he 'knows of the proceedings taken by his juniors.' " Slip Op., page 9.

In the case at bar, Judge Tyler not only knew of the actions of his subordinates, he knows of his *own* actions: he was the man who took responsibility for the investigation of the defendants. Now, as a private counsel, he cannot disavow his own public actions in order to deal with the very facts and, indeed, the very informant-cum-client, that he utilized during the investigation he directed while Deputy Attorney General, without transgressing Canon 9 of the Code of Professional Responsibility. See *Allbrand, Slip Op.*, page 4.

The case of *Lasky Brothers v Warner Brothers, supra*, is equally clear. *Lasky*, in fact, was a case which went *farther* than the NCLC asks this Court to go. The facts in *Lasky* were as follows. One Isacson had access to confidential information. Isacson was, at one time, a partner of Malkin. The partnership split up and Malkin formed a partnership with Ellner. The party whose information Isacson had access to moved to disqualify Malkin and Ellner. *The Second Circuit Court agreed that Malkin and Ellner had to be disqualified*, 224 F.2d at 826. Yet, the NCLC only seeks a rule analogous to the one applied to the Malkin and Isacson partnership, which was never even questioned in *Lasky*.

The Circuit ruled that since all parties of a disqualified partnership are disqualified, each partner carries that disqualification with him. In a second case, which had not been associated with the Malfin and Isacson partnership, Malkin and Ellner were not disqualified. This is the context of the language Judge Pierce quotes on page 14 of his opinion. No government official was involved at all in the *Lasky* case, and, indeed, the Patterson firm stands in the shoes of the Malkin and Isacson partnership in *Lasky*. The Malkin and Isacson partnership was disqualified from *both* cases then before the bar. Judge Pierce quotes language having only to do with the second level disqualification, of Malkin and Ellner a situation completely inapposite to the one at bar. Significantly, Judge Ryan wrote a scathing dissent in *Lasky*, on the grounds that the Malkin and Ellner partnership should have been disqualified in *both* cases.

"The principles to guide us in fixing the extent of professional obligations of the bar are not to be looked for in the market place." 224 F.2d at 832-833.

Also see *Consolidated Theaters v Warner Brothers*, 216 F.2d 920, 926 [2 Cir., 1954].

Judge Pierce ruled, in effect, that Tyler and Guiliani's disavowals of memory are enough to rebut the inference of prior knowledge as a matter of law. No court has ever equated a simple disavowal of memory with the rebutting of a strong inference. In the Seventh Circuit, in fact, such circumstances raise an *irrebutable presumption*. The Courts below further misapplied other presumptions of law.

The District Court held that the matter at bar was not the same matter that Tyler had had substantial responsibility for, and refused to apply the presumption of identity of matter called for in this area. See *infra*. However, in describing the "matter," Judge Pierce apparently believed that the matter at bar was the underlying trademark case. The matter at bar is Schlossberg's attempts to suborn the DOJ, and to use a DOJ informant [Rose] to steal confidential materials to serve as a witness. *That* being the actual matter at bar, Tyler - the man who highlighted the very investigation that Schlossberg in-

truded upon, and that Rose worked as an informant for as the chief effort of his section of the DOJ - was certainly involved as a matter of law. See *Nova Terapeutisk v Baxter Travenol* ——— *F.2d* ——— [7th Cir., February 27, 1979].

The basis of this error was, in turn, the Court's reliance on inappropriate authority. The only decision written in this case relied upon *Motor Mart v Saab*, 359 F. Supp. 156 [S.D.N.Y., 1973] for the proposition that only participation in identical matters merits disqualification. That case, however, involved former private employment, terminated *twelve full years* prior to the motion to disqualify. Yet, even so, Judge Pollak ruled that since the attorney therein's

> "Previous representation is *substantially related* to a present adverse representation . . . he must be disqualified." 359 F. Supp. at 158.
>
> Even if this relationship with Saab Motors Inc. was relatively small and even if the prior actions did not raise issues identical to those involved herein, his past activities raise a shadow over his present involvement." 359 F. Supp. at 158 [emphasis added].

One can only conclude that the Courts below misread this case. *Emle v Patentex, supra, General Motors v New York, supra*, and *Hull v Celanese*, 513 F.2d 568 [2d Cir., 1975] are also similarly miscited in this connection. *Hull v Celanese*, the leading case supporting NCLC's position, is simply incapable of supporting the reading given it below.

In *Hull*, an attorney for the defendant corporation, which was accused of sex discrimination, quit her job and became a plaintiff. This former attorney was quite scrupulous *not* to inform the plaintiff's attorneys with whom she was now allied, of any privileged information. It goes without saying that there was no question of removal of work product. Nonetheless, the Second Circuit laid down a strict, prophylactic rule in disqualifying the plaintiff's attorneys who had accepted her as a client. The Circuit ruled that even the *unconscious* transfer of privileged information had to be prevented, and adopted the rule that where any doubt exists, the reputation of the legal profes-

sion demands resolution of that doubt in favor of disqualification. The Court below ruled that when Tyler merely said that he did not remember what was in the papers he reviewed, he cleared up all possible doubt in the matter. To accept such an illogical conclusion is to:

> ". . .overlook the *spirit* of Canon 9 as interpreted in Emle [Emle v Patentex, 478 F.2d 562, 2 Cir., 1973] . . . Emle makes it clear that *the Court need not inquire whether the lawyer did, in fact, receive confidential information* . . . Emle Industries v Patentex Inc., supra, 478 F.2d at 571. Rather, where it can reasonably be said that . . . the attorney *might* have acquired information related to the subject matter of the subsequent representation, T.C. Theater Corp. supra, 113 F. Supp. at 269 . . . it is the Court's *duty* to order the attorney disqualified. Id at 571. *The breach of confidence would not have to be proved; it is presumed in order to preserve the spirit of the Code.*" 513 F.2d 568, 571 [emphasis added in part, original in part].

In other words, any doubt at all should be resolved in favor of disqualification. *Fleisher v AAP*, 163 F. Supp. 548, 553-555, App. dismissed 264 F.2d 515 [2nd Cir.] *cert. den.* 359 U.S. 1002 [1959]. By way of contrast, the Courts below cast upon NCLC the impossible burden of proving, in the face of Tyler's asserted loss of memory, without cross-examination, and without access to the documents that Tyler had, what had transpired in a meeting wherein Tyler read files containing NCLC's confidential information.

The rule of *Hull* and *Emle* is simply not ambiguous, nor susceptible to the reading given it by the Court below. Recent expressions by the Second Circuit are clear on this point:

> "The client's privilege in confidential information . . . is not nullified by the fact that the circumstances to be disclosed are part of a public record, or that there are other available sources of such information, or by the fact that the lawyer received the same information from other sources." *NCK v Bregman*, 542 F.2d 128, 133 [2nd Cir., 1976].

"The appellant's reading of Hull is quite inaccurate: *his argument as to the necessity of actual possession and actual receipt of confidences was made in Hull and characterized there as a 'technical' one which overlooked 'the spirit of Canon 9* as interpreted by the Court in Emle' . . . the court need not 'inquire whether the lawyer did, in fact, receive confidential information . . .' " *NCK v Bregman*, 542 F.2d at 134 [emphasis added in part, original in part].

The tainted information in *NCK v Bregman, supra*, as in the case of the Rose-Schlossberg-DOJ information at bar, related to "corporate state of mind." Therefore, disqualification was mandatory. 542 F.2d at 131. See *India v Cook Industries*, 422 F. Supp. 1057, 1060 and 1064 [S.D.N.Y., 1976]. The same result should pertain herein.

In the Seventh Circuit, the presumption of receipt of confidences is irrebutable. The Seventh Circuit has, in the past year, reversed several District Courts' denials of disqualification, in the interest of creating an irrebutable presumption in the area of lawyers' confidences barring subsequent employment of that lawyer opposite the client whose confidences he has. A seminal case was *Westinghouse v Kerr-McGee*, 580 F.2d 1311 [7th Cir., 1978] *cert. den.* 99 S. Ct. 353. There, a law firm, Kirkland and Ellis, came into receipt of confidences of an opponent client through its lobbying efforts in an entirely unrelated matter. The Seventh Circuit ruled that the lack of a formal lawyer-client relationship was irrelevant:

"A professional relationship is not dependent upon the payment of fees, nor, as we have noted, upon execution of a formal contract. [two footnotes omitted] . . . The District Court abused its discretion in applying a narrow, formal agency approach to determining the attorney-client relationship . . . the client is no longer simply the person who walks into a law office." 580 F.2d at 1317-1318.

So saying, the Court disqualified the Kirkland firm *on the basis of Canon 9*, since its activity could lead to "public suspicion or obloquy." Similarly, having come into possession of the NCLC's confidences from his privileged position as

DAG, Judge Tyler and his firm should certainly have been disqualified in the case at bar, as they would have been in the Seventh Circuit. A revealing view of the gravity with which this question must be viewed may be gathered from the series of articles appearing in the *National Law Journal*, March 19, 1979 [page 5] and May 21, 1979 [page 3]. The latter article, discussing the case of *U.S. v Outboard Marine*, No. 78-1004 [N.D., Ill.] poses the dilemma created by the Second Circuit. If Judge Tyler can rebut the presumption of possession of confidences by mere assertion, cannot the defendants seek discovery of Judge Tyler to overcome his claim not to have received confidences? The result is that, unless the strict prophylactic rule of the *Westinghouse* and *Novo Terapeutisk* cases are applied, then either disqualification motions drag on endlessly, or the ethical standards on which the courts rely for their credibility are compromised.

In conclusion, the NCLC need not show the actual transfer of confidential information, as Judge Pierce apparently demanded of them; merely the existence of a situation wherein a high-ranking government official had *access* to materials concerning the case at bar, and now seeks to participate in the case at bar. This the NCLC has done.

"The balance must be drawn in favor of the . . . public's interest in preservation of confidences and appearance of propriety." *India v Cook*, 422 F. Supp. at 1064.

In fact, the presumption of law that the matters were not the same is not needed to reach this conclusion as a matter of irrefutable fact. The papers *from the very case at bar*, were found in the DOJ investigative file that Tyler reviewed, and which the DOJ now agrees were so confidential as to enter into a consent order barring their release. Thus, the matter at bar in which the Patterson firm wishes to participate is *both* "the same lawsuit" *and* "the same issues of fact involving the same parties and the same situation." ABA Formal Opinion 342, 62 ABAJ 517 at 519. Schlossberg's communications with the DOJ makes it indisputably clear that he was not simply aware of, but motivated by the identity of the two matters before the District Court in New York, and those he wished to

stir up before the DOJ. The opinion of the Courts below took no cogniscence of these truly remarkable facts. This was not the exercise of discretion, but simply an error that has the effect of embedding a dangerous and confusing precedent in an area of law, that of ethics, which is badly in need of precision and clarity.

This decision has a point of particular irony in that the strongest expressions supportive of defendants' position were enunciated by Judge Tyler when he sat on the bench. The best example of that is the case of *Handlemann v Weiss*, 368 F. Supp. 258 (SDNY, 1973).

Handleman v Weiss, 368 F. Supp. 258 (SDNY, 1973) Tyler, J., concerned an attorney (Solomon) who had been appointed by a government agency (The Securities Investors Protection Corporation—SIPC) to act as a trustee over an investment firm. Solomon did so, then resigned, formed a law firm, and, in time, was retained to sue the same investment firm. Judge Tyler brushed aside a host of technical quibbles, including the claim that Solomon was not really a public official, and that at any rate his private employment was not the same matter as his trusteeship—exactly the sort of hyper-technicalities that characterized the decision below. Judge Tyler focussed in on two points: the *appearance* of impropriety, and the *opportunity* to benefit from information gained as a public official. His words apply with pointed relevance to the actions of the Patterson firm.

> "Solomon's representation of SIPC trustee, followed shortly thereafter by his representation of plaintiffs . . . has created, at the very least, the appearance of impropriety . . . This position gave him a real advantage in learning of any illicit activities in which defendants may have been engaged . . . (he) was able to obtain information that he would have been unable to secure if he had been interviewing in a private capacity." 368 F. Supp. at 263, citing *Allied Realty*. And see ABA Formal Opinion 134 (March 15, 1935).

This standard applies with imperative force to Judge Tyler, who admits possibly having requested an FBI investigation of

defendants, and who certainly reviewed the fruits of such investigation. Judge Tyler, writing from the bench, went further. He did not make the confidentiality of the information determinative. In fact, he clearly stated that the integrity and reputation of bench and bar was the most vital factor:

> "*Even if the information* upon which plaintiffs' suit is based *were freely available*, however, *this would not prevent the disqualification* of Solomon if his behavior presented the appearance of impropriety." (See generally, *Doe v A*, 330 F. Supp. 1352, 1355 (SDNY, 1971) aff'd per curiam 453 F.2d 1375 (2 Cir., 1972), *Fleisher v AAP*, 163 F. Supp. 548 (SDNY, 1958) appeal dismissed sub non., *Fleisher v Phillips*, 264 F.2d 523, (2 Cir.) *cert. den.*, 359 U.S. 1002 (1959).
>
> "Finally, there is a danger that if men in the position of Solomon are permitted to bring suit, the public confidence in the integrity of the judicial process would be undermined." 368 F. Supp. at 264, citing C. J. Kaufman in *Emle v Patentex*, 378 F.2d at 575. (*emphasis added*).

Judge Tyler was peremptory in rejecting the claim that, if a member of a firm was disqualified, the firm might "screen" that member from the matter and so continue the representation:

> "The disqualification of Solomon must logically extend to include the members of his law firm as well. There is no reason to suppose that Solomon has not communicated his view of this case to his partners and his knowledge must therefore be imputed to them. (Consolidated Theatres v Warner Brothers, 216 F.2d 920 (2 Cir., 1954); U.S. v Standard Oil, 136 F. Supp. 345, 362 (SDNY, 1955)". 368 F.2d at 264. *Accord: Telos v Hawaiian Telephone Co.*, 397 F. Supp. 1314, 1318 (D. Haw., 1975).

The rejection of an artificial and unbelievable distinction between a firm and its members is all the more applicable when not one, but two members are disqualified, as are Judge Tyler and Mr. Guiliani.

The Second Circuit's requirement that the honor of the legal profession be preserved from the appearance of impropriety by an iron-clad rule, a position first enunciated in ABA Opinion 135, and then in Judge Kaufman's seminal Harvard Law Review article, is emphatically still the law today. Opinion 135 (March 15, 1935) states:

> "The investigation of the prosecutor was ostensibly in the exercise of official authority: information was obtained from persons, who may have felt, quite naturally under a sense of coercion or respect for actual or supposed power...Unsuspecting, unshielded, at serious disadvantage, he submitted to interrogation by one who later, as opposing counsel in a civil action, might use the knowledge thus acquired against him."

Judge Tyler has knowledge of a seven-year and more FBI investigation made under color of law. This language is as if written for him. Judge Kaufman, who believes strongly that *junior* government attorneys should not be disqualified so as to deter them from public service, has a stern rule for *senior* government attorneys, who must be disqualified:

> "Where the supervisor had ultimate responsibility for all the work of his office, *despite the fact that he was not informed about some of it*." 70 Harvard Law Review at 667 (*emphasis added*).

Judge Tyler was, plainly, such a supervisor. The law is still applied with this sense of traditional propriety. In *Canadian Gulf Lines v Triton*, 434 F. Supp. 691 (D. Conn., 1976), the Court was persuaded that the attorney in question did *not* recall having knowledge of the matter from his prior employment, yet both the attorney and his firm were disqualified. This is precisely what Judge Pierce found to be the case. Nonetheless, the Court in *Canadian Gulf* held:

> "The admonition of Canon 9 of the Code of Professional Responsiblity that a lawyer should avoid even the appearance of impropriety justifies resolving the issue in (defendants') favor, even if, as appears likely, there has been no actual wrong-doing." 434 F. Supp. at 685.

Thus, the latest pronouncement of the law is on point with the facts at bar. *Accord*, the latest opinion by the ABA. See *ABA Informal Opinion 1374* (September 7, 1976).

That the Deputy Attorney General and his top associate, having reviewed an investigation consisting of 10,000 pages of confidential FBI reports on defendants, would, within five days of becoming free of criminal liability therefore under 18 U.S.C. 207, appear as counsel against those very defendants, in an issue involving ethics, and intimately involving activities of the Justice Department (Mr. Rose was an FBI informant, Mr. Schlossberg sent letters and lengthy memoranda on the case at bar to the Justice Department) is the very heart and core of the evil that D.R. 9-101 (B) was written to prevent. It may be that, as the Second Circuit has said in Shakespeare's Iago's cynical words, "There is nothing either good or bad but thinking makes it so." See *Emle v Patentex*, 478 F.2d at 571; *General Motors v City of New York*, 501 F.2d at 651. It is respectfully submitted that to permit the Patterson firm to participate herein is to compel every moral observer to think cynically of the bench, the bar and the legal profession. Judge Tyler in his role as an objective minister of justice, has stated this to be the law in no uncertain terms. *Handleman v Weiss*, 368 F. Supp. 258 (SDNY, 1973). Would it not be an invitation to public censure of our profession if Judge Tyler, as a private attorney, was not compelled to obey the law *as he himself enunciated it from the bench?* Yet, that is the rule enunciated below. Such a rule is intolerable and should be reversed.

One cannot but be brought up short by the appearance of *gross* impropriety. A government attorney of high executive rank reviews a confidential document. He then uses the contents against private citizens in a civil action. The attorney's former agency withholds the unexpurgated document from the victimized private parties, and the Court awards the former government attorney by then finding that the private party has failed to prove the content of the hidden document. Indeed, the opinion of the District Court at this point reads like an advocate's brief, accusing the NCLC of "speculation." If

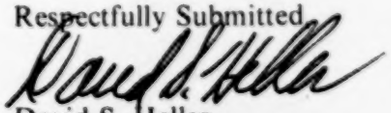
NCLC speculated, it was forced to do so because the DOJ—the former common employer of Tyler, Guiliani, and Rose, and the locus of the Schlossberg lobbying campaign—hid the information. The Courts below used that fact to reward the Patterson firm, and defeat the NCLC's rights.

Any citizen capable of logical thought, as well as the members of the legal community, must be dismayed at the prospect of the decision below becoming embedded in the law as precedent. That an attorney, a former Federal Judge who espoused a high-sounding theory of ethics from the bench, would, but one year after presiding over and publicly lauding a pointless investigation of a political party, allow his firm to appear in defense of a matter that centers around that very investigation, Schlossberg's inflammation of it, and Rose's abuse of it, is not the *appearance* of impropriety; it *is* improper. It would be a regrettable day if, by way of inaction upon this Petition, this Court should embed in the law a precedent that renders nugatory the ethical standards so necessary to the proper practice of law.

CONCLUSION

THE INSTANT PETITION FOR CERTIORARI SHOULD BE GRANTED AND THE DECISION OF THE COURT BELOW SHOULD BE REVERSED

Respectfully Submitted,



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APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

INTERNATIONAL UNION, UNITED AUTOMOBILE AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW),

Plaintiff,

- v -

74 Civ. 5131

NATIONAL CAUCUS OF LABOR COMMITTEES, et al.

Defendants.

APPEARANCES:

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LAWRENCE W. PIERCE, D.J.

OPINION AND ORDER

This action is brought by plaintiff ("UAW") International Union, United Automobile, Aerospace and Agricultural Implement Workers of America to recover damages for trademark infringement, unfair competition and prima facie tort. The core of the action is the alleged infringement of the name "Solidarity" in plaintiff's publication by defendants' use of the name "New Solidarity" in their publication. Defendants are the National Caucus of Labor Committees ("NCLC") and various individuals allegedly related to this organization. Defendants have counterclaimed essentially alleging malicious conduct on the part of plaintiff and violations of defendants' civil rights.

The trademark infringement and unfair competition claims were severed from the other claims and counterclaims, and were placed on the Court's ready trial calendar for trial in summer 1977.[1] By letter of July 17, 1977, defendants' attorney, David S. Heller, informed the Court of alleged unethical conduct on the part of plaintiff's attorneys. The allegations were eventually presented in the form of a motion to disqualify ("the first motion") which was referred to Magistrate Kent Sinclair.

In the first motion, defendants essentially asserted that one of plaintiff's potential trial witnesses, Gregory Rose, was a Federal Bureau of Investigation informant who allegedly infiltrated the NCLC security staff. Defendants alleged that Rose functioned in a legal or semi-legal capacity with NCLC and even stole legal papers from NCLC which he then allegedly

transmitted to plaintiff's counsel and to the FBI. This information is set forth in affidavits from defendant's counsel (Heller) and NCLC officers (Spannaus; Inch). In an opposing affidavit, Rose denied these allegations and also denied having access to any privileged communications. In their affidavits plaintiff's trial counsel, Roger Zissu, and Stephen Schlossberg, general counsel to UAW, also denied receiving the privileged communications alleged by defendants.

On December 2, 1977, Magistrate Sinclair recommended that defendants' motion be granted insofar as disqualifying Roger Zissu, and his form, Cowan, Liebowitz &Latman, as well as Schlossberg. Voluminous papers objecting and supporting the Magistrate's report were submitted to the Court. Plaintiff requested D. Robert Owen of the firm, Patterson, Belknap, Webb and Tyler, to represent it on the first motion. No objection was initially voiced by defendants and an order was signed on March 23, 1978 adding Owen and his firm as counsel. On March 30, 1978, while objections to the Magistrate's report were *sub judice*, Heller advised the Court of possible ethical problems in Owen's appearance. Specifically, he objected to Owen's appearance because two members of Owen's firm, Harold R. Tyler, Jr. and Rudolph W. Guiliani, were formerly United States Deputy Attorney General and Associate Deputy Attorney General, respectively, in the Justice Department. It is apparently undisputed that the FBI conducted an investigation of the NCLC during the period Tyler and Giuliani were with the Justice Department. Defendants allege that because of their positions Tyler and Giuliani had access to confidential information about the defendants. On this basis, defendants now move to disqualify Owen and his form for alleged violations of Canon 9 and Disciplinary Rule 9-101(B) ("the second motion").

DISCUSSION

Canon 9 of the American Bar Association's Code of Professional Responsibility ("the Code") states as an axiomatic norm that "[a] lawyer should avoid even the appearance of impro-

priety." The two statements which deal specifically with former governmental employees are Ethical Consideration 9-3 and Disciplinary Rule 9-101(B). Ethical Consideration 9-3 states:

> "After a lawyer leaves judicial office or other public employment, he should not accept employment in connection with any matter in which he had substantial responsibility prior to his leaving, since to accept employment would give the appearance of impropriety even if none exists."

Disciplinary Rule 9-101(B) states:

> "A lawyer shall not accept private employment in a *matter* in which he had *substantial responsibility* while he was a public employee." (Emphasis supplied).

The Code explains that "[t]he Disciplinary Rules state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action." Courts have traditionally looked to the Code in determining disqualification motions. See *Fund of Funds, Ltd.* v. *Arthur Andersen & Co.*, 567 F.2d 225, 227 n.2 (2d Cir. 1977); *Handleman* v. *Weiss*, 368 F.Supp. 258, 261 n.4 & 263 (SDNY 1973) and cases cited therein.

As a starting point, the Court heeds the admonition of Chief Judge Kaufman:

> "When dealing with ethical principles, . . . we cannot paint with broad strokes. The lines are fine and must be so marked. Guideposts can be established when virgin ground is being explored, and the conclusion in a particular case can be reached only after painstaking analysis of the facts and the precise application of precedent." *Fund of Funds, Ltd.* v. *Arthur Andersen & Co.*, 567 F.2d 225, 227 (2d Cir. 1977), quoting *United States* v. *Standard Oil Co.*, 136 F.Supp. 345, 367 (SDNY 1955).

Further, it is noted that particularly in a case such as this which has engendered such bitterly contested litigation during its four years[2] and which promises to continue doing so:

> "the attempt by an opposing party to disqualify the other side's lawyer must be viewed as part of the tactics of an adversary proceeding. As such it demands judicial scrutiny to prevent literalism from possibly overcoming substantial justice to the parties." *J.P. Foley & Co.* v. *Vanderbilt*, 523 F.2d 1357, 1360 (2d Cir. 1975); see *Woods* v. *Covington County Bank*, 537 F.2d 804, 813 (5th Cir. 1976).

The standard for determining whether there is a violation of R 9-101(B) is (1) whether any dealings Tyler and Guiliani had while in government employ are the same "matter" as involved in the present case or the first motion, and (2) whether they had "substantial responsibility" for those dealings.

> "When assessing the similarity of the subject matter in the context of both Canon 9's requirement that an attorney avoid the appearance of impropriety and Canon 4's requirement that an attorney not disclose the confidences of his client, the courts of this circuit have frequently applied the so-called 'substantially related' test." *Allbrand Appliance & Television Co.* v. *Advent Corp.*, 78 Civ. 2510, slip op. at 4-5 (SDNY Dec. 4, 1978).

As originally formulated in *T.C. Theatre Corp.* v. *Warner Brothers Pictures, Inc.*, 113 F.Supp. 265 (SDNY 1953), the test provided that:

> "the former client need show no more than that the matters embraced within the pending suit wherein his former attorney appears on behalf of his adversary are substantially related to the matters or cause of action wherein the attorney previously represented him, the former client. The Court will assume that during the course of the former representation confidences were disclosed to the attorney bearing on the subject matter of the representation." *Id.* at 268.

Thus, the substantial relationship test "created an inference that confidential information was reposed. [C]omplainant

need[ed] only [to] show *access* to such *substantially related* material and the inference that defendant received these confidences [would] follow." *United States* v. *Standard Oil Co.*, 136 F.Supp. 345, 354 (S.D.N.Y. 1955). Recent cases have honed the substantial relationship test to the point of granting disqualification only upon a showing that the relationship between issues in the prior and present cases is "patently clear." See *Government of India* v. *Cook Industries, Inc.*, 569 F.2d 737, 739-40 (2d Cir. 1978); *Silver Chrysler Plymouth, Inc.* v. *Chrysler Motors Corp.*, 518 F.2d 751, 754-56 (2d Cir. 1975). In fact, disqualification has generally been granted only when the issues involved have been identical (see *Hull* v. *Celanese Corp.*, 513 F.2d 568 (2d Cir. 1975); *General Motors Corp.* v. *City of New York*, 501 F.2d 639 (2d Cir. 1974); *Emle Industries, Inc.* v. *Patentex, Inc.*, 478 F.2d 562 (2d Cir. 1973)) or "essentially the same" (*Motor Mart, Inc.*, v. *Saab Motors, Inc.*, 359 F. Supp. 156 (SDNY 1973).

In 1975, the American Bar Association Committee on Professional Ethics issued an opinion in an attempt to provide some guidance on DR 9-101(B). See ABA Formal Opinion No. 342 (Nov. 24, 1975), published in 62 *A.B.A.J.* 517 (1975) (hereinafter cited as "Opinion 342"). The ABA defined "matter" as contemplating:

> "a discrete and isolatable transaction or set of transactions between identifiable parties. Perhaps the scope of the term 'matter' may be indicated by examples. The same lawsuit or litigation is the same matter. The same issue of fact involving the same parties and the same situation or conduct is the same matter. By constrast, work as a government employee in drafting, enforcing or interpreting government or agency procedures, regulations, or laws, or in briefing abstract principles of law, does not disqualify the lawyer under DR 9-101(B) from subsequent private employment involving the same regulations, procedures, or points of law; the same 'matter' is not involved because there is lacking the discrete, identifiable transactions or conduct involving a particular situation and specific parties." Opinion 342 at 6, 62 *A.B.A.J.* at 519 (footnotes omitted).

In the present case, it appears that there are two situations in which Tyler or Guiliani may have been involved which might constitute the same matter as this lawsuit or the first motion. First, Tyler states that he reviewed a Freedom of Information Act appeal of one of the defendants herein, Nancy Spannaus. (Tyler affidavit ¶¶5 & 6). Guiliani apparently had no connection with the FOIA matter (Guiliani affidavit ¶5), but states that it was his practice to review staff summaries regarding FBI investigations and that he attended a 20 minute meeting which discussed the aforesaid investigation (Guiliani affidavit ¶7).

The Court has no hesitation in finding that Tyler's review of the FOIA request of Nancy Spannaus did not involve the same matter as this litigation or the first motion. Tyler's affidavit points out that the processing of the administrative review was a routine matter. Defendants have not shown otherwise or that Tyler viewed any deleted material which might have been confidential information related to this litigation. The Court finds no reason to discredit the affidavit of Quinlan J. Shea, Jr., the Director of the Office of Privacy and Information Appeals in the Deputy Attorney General's Office. Shea also stated that record reviews were routinely processed and presented to Tyler "in the form of a memorandum, which usually included the background of the case, the position of the component involved, a description of the records in question and a proposed final action . . . If the Deputy Attorney General agreed with the recommendation . . . he signed a letter drafted by this office to accompany the memorandum, informing the appellant of the final agency action on the appeal." (Shea affidavit ¶4).

A closer question is presented regarding the review of an FBI summary on whether to continue an investigation of the NCLC. Plaintiff asserts that the matter involved in passing upon this review was whether the NCLC and others were engaging in activities that involved violence or potential violence that constituted possible violations of federal law, for the purpose of overthrowing or interfering with the government of the United States or a state or depriving persons of their civil rights. See Attorney General Guidelines for Domestic Security Investigations (March 3, 1976), attached to Exhibit 4. However,

the Court understands defendants' argument to assert that in deciding whether to continue the FBI investigation Tyler and Schlossberg necessarily had to review confidential information regarding the defendants. Even in this situation, the Court is hard-pressed to find that the same matter is involved. There appears no reason to doubt Tyler and Guiliani's assertions that they never reviewed original source documents and had no access to the underlying FBI documents used in preparing the summaries. Defendants contend that Exhibit 5 is the FBI summary in question, but Tyler and Guiliani have no specific recollection that this is the document in question. It is undisputed that the review occurred in summer 1976 and it appears likely that this document is the FBI summary since it is dated July 15, 1976. Most of the document has been withheld by the government and has not been provided to the defendants. However, even the headings of Exhibit 5 attest to the matters for which the summary was prepared, *e.g.*, "B. Basis of Investigation; 1. Force and Violence, 2. Foreign Influence, etc." The review of the continuance of the investigation was conducted pursuant to certain stated guidelines.

On the other hand, the present case involves alleged trademark infringement and unfair competition. The first motion involves the status and contacts of a person formerly with the NCLC and his alleged transmittal of privileged communications of defendants to plaintiff's attorneys. The essence of defendants' argument is that there was privileged information which *may or may not* have been presented to the FBI which *may or may not* have led to the FBI obtaining information not known to defendants or confidential information which *may or may not* have appeared in the summaries reviewed by Tyler and Guiliani.[3] Even if such a sequence of events, occurred, defendants have not demonstrated how such knowledge on the part of Owen would be relevant to the plaintiff's position in the first motion. The Court emphasizes that the relationship must be "patently clear" or, at the minimum, substantial. Here it is neither.

During oral argument on this second motion, defendants' attorney also hypothesized that the FBI investigation *may or may not* have obtained information relating to the trademark infringement or unfair competition claims which are at issue in

this action. The Court notes that Owen entered this lawsuit for the limited purpose of representing plaintiff's attorney in the first motion. Drawing the additional inference defendants urge would lengthen an already tenuous chain of "if's." While Canon 9 does not imply that there need be no proof of actual wrongdoing, mere speculation will not suffice. See *Woods v. Covington County Bank*, 537 F.2d 804, 813 (5th Cir. 1976). The Court finds that this is not an appropriate case for disqualification based upon speculation that the FBI summary may have contained confidential information related to the present litigation, when the more reasonable inference is that the document containnd material solely related to domestic security.[4]

Even if the Court were to determine that the same matters were involved, the Court finds that the defendants did not have "substantial responsibility." "We wish to note that DR 9-101(B) does not automatically require disqualifications if the lawyer, as a government employee, merely had actual or imputed knowledge of the facts relating to a matter. Disqualification is required only if the lawyer had 'substantial responsibility.' " Opinion No. 889 of the Association of the Bar of the City of New York, 31 *The Record* 552, 560 (1976).

Defendants contend that since Tyler and Guiliani were heads of government offices or subdivisions, a principle of "vertical imputation of knowledge" is applicable. This principle was explained by Chief Judge Kaufman in *The Former Governmental Attorney and The Canons of Professional Responsibility*, 70 Harv. L. Rev. 657 (1957):

> "Although there are many supervisory officials who are ultimately responsible for myriad decisions which they do not personally make and for numerous rulings which they never actually review, nonetheless, since ultimate responsibility is theirs, knowledge of all work done by their subordinates should be imputed to them. This position is similar to the conclusion that the specific requirement to perform a related task will disqualify regardless of whether that assignment was actually performed. I believe this rule of vertical responsibility is absolutely essential to avoid the appearance of evil." *Id.* at 666.

This statement was written in the context of Canon 36, the predecessor of Canon 9. Opinion 342 explains substantial responsibility as

> "envisag[ing] a much closer and more direct relationship than that of a mere perfunctory approval or disapproval of the matter in question. It contemplates a responsibility requiring the official to become personally involved to an important, material degree, in the investigative or deliberative processes regarding the transactions or facts in question. Thus, being the chief official in some vast office or organization does not *ipso facto* given the government official or employee the 'substantial responsibility' contemplated by the rule in regard to all the minutiae of facts lodged within that office. Yet it is not necessary that the public employee or official shall have personally and in a substantial manner investigated or passed upon the particular matter, for it is sufficient that he had such a heavy responsibility for the matter in question that it is unlikely he did not become personally and substantially involved in the investigative or deliberative processes regarding the matter. With a responsibility so strong and compelling that he probably became involved in the investigative or decisional processes, a lawyer upon leaving the government service should not represent another in regard to that matter." Opinion 342, *supra*, at 9, 62 *A.B.A.J.* at 520 (footnotes omitted.)

In the present case, there has been no showing that the decision on the FOIA appeal was anything other than perfunctory. While there may still be a rule of vertical imputation of knowledge, "the courts have permitted lawyers to rebut the inference that they were in actual possession of information relating to the later litigation while serving in their former capacities." *Allbrand Appliance & Television Co.* v. *Advent Corp.*, 78 Civ. 2510, slip op. at 9 (S.D.N.Y. Dec. 4, 1978). The Court also does not find that Tyler or Giuliani's participation in the FBI investigation of NCLC involved them to an important, material degree, in the investigative processes regarding either the first motion or the trademark and unfair competition claims.

Even the testimony of the attorney whose ethical conduct is questioned has been considered sufficient rebuttal. See *Lasky Brothers of West Virginia, Inc.* v. *Warner Brothers Pictures, Inc.*, 224 F.2d 824, 827 (2d Cir. 1955), *cert. denied.*, 350 U.S. 932 (1956) ("It will not do to make the presumption. . .rebuttable and then make the standard of proof for rebuttal unattainably high. This is particularly true where, as here, the attorney must prove a negative, which is always a difficult burden to meet.") The Court concludes that the affidavits of Tyler and Giuliani which deny any knowledge have sufficiently rebutted any inference of their knowledge that may arise by virtue of their prior positions.

Finally, defendents contend that the mere retention of Tyler's firm creates the appearances of impropriety since Tyler was formerly with the Justice Department. The Court notes that this is not the type of "appearance of evil" which has generally been discussed. The Second Circuit has stated that the purpose of Canon 9 is to avoid the possibility that a former government lawyer's action as a public officer "might be influenced (or open to the charge that it had been influenced) by the hope of later being employed privately to *uphold* or *upset* what he had done." *General Motors Corp.* v. *City of New York*, 501 F.2d 639, 649 (2d Cir. 1974), quoting ABA Committee on Professional Ethics, Opinion No. 37 (1931). See also *United States* v.*Standard Oil Co.*, 136 F. Supp. 345, 359 (S.D.N.Y. 1955). The logical extension of defendants' contention appears to be that there would be an appearance of impropriety in plaintiff's retention of Tyler's firm in a case in the Southern District of New York since Tyler was formerly in this district. The Court does not adopt such a restrictive reading of Canon 9. It is noted that Canon 36, the predecessor of Canon 9, might have warranted an interpretation in accord with defendants' contention. Canon 36 stated:

> "A lawyer having once held public office or having been in public employment, should not after his retirement accept employment in connection with *any matter* which he has investigated or *passed upon* while in such office or employ." (Emphasis supplied).

However, EC 9-3 speaks of "substantial responsibility." Canon 9 was adopted to replace Canon 36 precisely because Canon 36 "proved to be too broadly encompassing." Opinion 342, *supra*, at 7, 62 *A.B.A.J.* at 519.

Further, it has been suggested that if the tests of same "matter" and "substantial responsibility" are not met, there can be no appearance of impropriety. See Note, 44 *Fordham L. Rev.* 130, 145 (1975) ("If courts cannot find on the facts that substantially related matters are involved or cannot make the inference of confidential knowledge, courts should not rely on Canon 9 to justify a disqualification order.") Cf. *Silver Chrysler Plymouth, Inc.* v. *Chrysler Motors Corp.*, 518 F.2d 751, 757 (2d Cir. 1975) ("Although Canon 9 dictates that doubts should be resolved in favor of disqualification,. . .it is not intended completely to override the delicate balance created by Canon 4 and the decisions thereunder."). Finally,

> "an inflexible application of Canon 9 would frequently defeat important social interests including the client's right to counsel of his choice, the lawyer's right freely to practice his profession, and the government's need to attract skilled lawyers." *Woods* v. *Covington County Bank*, 537 F.2d 804, 812 (5th Cir. 1976).

> "We emphasize that an attorney need not be disqualified even where there is a reasonable possibility of improper professional conduct. [A] court must also find that the likelihood of public suspicion or obloquy outweighs the social interest which will be served by a lawyer's continued participation in a particular case. Under Canon 9, an attorney should be disqualified only when both of these standards have been satisfied." *Id.* at 813 n.12

The Court does not make such a finding in this case.[5]

Conclusion

For the foregoing reasons, defendants' motion to disqualify D. Robert Owen, Esq., and the firm of Patterson, Belknap, Webb and Tyler is hereby denied.

The Court hereby schedules an evidentiary hearing on defendants' first motion to disqualify for February 20, 1979 at

10:00 a.m. in Courthouse 906. Such a hearing is limited to aiding the Court in determining whether or to what extent Gregroy Rose had any contact with the defendants' legal endeavors in this case and whether he transmitted any of defendants' privileged communications to plaintiff's attorneys. The parties are to premark and index their exhibits. Copies of the index and a list of witnesses to be presented at the hearing are to be exchanged between the parties prior to being provided to the Court on or before February 13, 1979. The Court recognizes that the determination of this second motion is directly appealable. *Silver Chrysler Plymouth, Inc.* v. *Chrysler Motors Corp.*, 496 F.2d. 800 (2d Cir. 1974). Accordingly, defendants are directed to promptly notify this Court and plaintiff's counsel of their intent, if any, to appeal.

SO ORDERED.

Dated: New York, New York
January 12, 1979

FOOTNOTES

1. Subsequent to the submission of pretrial papers, an additional dispute arose as to the pleadings and a notice of admission by default, which was referred to Magistrate Martin D. Jacobs on November 7, 1977. By order of that same date, the Court removed this action from its ready trial calendar in view of the continued pretrial litigation in the case.
2. This action was filed on November 21, 1974. Approximately 16 separate motions have been made since that date to May 22, 1978. See also note 1, *supra*.
3. The Court recognizes the problem of defendants in relying on government documents which they have not reviewed, but which the individuals they seek to disqualify have

reviewed but do not recall. However, since the Court has no reason to doubt Tyler or Giuliani's lack of knowledge other than that stated in their affidavits, plaintiff does not appear to have any better knowledge than defendants. This is not to suggest that in other fact situations involving such a problem, the movant could not have a valid argument. The Court merely observes that it is under a similar disability as the parties since the actual summaries in question would appear to be in the custody of the Justice Department of the FBI, neither of whom are parties to this action.

4. This reasoning would also appear applicable to Exhibit 10 which indicates that it was routed to Tyler who claims to have no independent recollection of it. The exhibit indicates that it is an "Internal Security Action Memorandum." Neither does the Court speculate as to the documents which were attached to Exhibits 6 through 9.
5. Given the Court's denial of the disqualification motion, the Court need not consider whether screening would be appropriate in this case.